



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 5, 2003

Mr. Bill Ainsworth
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2003-2996

Dear Mr. Ainsworth:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180468.

The City of Corpus Christi (the "city") received a written request for four categories of information:

- 1) In-house e-mails, memos, or other correspondence regarding a health insurance claim involving [a named individual];
- 2) E-mails, memos or other correspondence between [the city's] Risk Manager and City Councilman Rex Kinnison;
- 3) Bids submitted to the city in response to an RFP for health insurance services; and
- 4) Information provided to the city council regarding the above bids and a subsequent vote awarding a contract to Entrust, Inc.

You contend that the information coming within the scope of the request, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101, 552.107(1), and 552.137 of the Government Code.¹

You have also sought a decision from this office pursuant to section 552.305 of the Government Code regarding certain information submitted to the city by outside third parties. Section 552.305 of the Government Code allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public. In accordance with section 552.305(d), the city was required to notify representatives of the interested third parties of the records request and of their right to submit arguments to this office as to why their information should not be released to the public. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

This office did not receive a response from any third party representatives indicating that they wished to have any portion of their records withheld from the public. This office therefore has no basis for concluding that the third parties have a privacy or property interest in this information. Consequently, the city must release the documents you submitted under Exhibit D to the requestor in their entirety.

We now address whether the other documents you submitted are excepted from public disclosure. You first contend that the records you submitted under Exhibit A contain information that must be withheld from the public pursuant to section 552.101 of the Government Code, which excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that the documents you submitted to this office under Exhibit A contain information made confidential under the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). However, after reviewing these documents, this office could discern no information consisting of medical record information. Consequently, the city may not withhold any portion of the documents submitted under Exhibit A pursuant to the MPA.

We also note that Exhibit A contains an individual's social security number. Social security numbers are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security numbers were obtained or are maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security number contained in Exhibit A was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number at issue was obtained or is maintained pursuant to such a statute and is, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the city should ensure that this number was not obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

You also contend that portions of Exhibit A are excepted from required public disclosure pursuant to section 552.101 in conjunction with the common-law and constitutional rights of privacy. Section 552.101 also protects information coming within the right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The constitutional right to privacy consists of two related interests: 1) the individual interest in independence in making certain kinds of important decisions, and 2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976) and are inapplicable here. The second interest, in

nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). After reviewing the contents of Exhibit A, we conclude that none of those documents contain information that implicates any individual's privacy interest. Consequently, the city may not withhold any of this information under either constitutional or common-law privacy.

We note, however, that certain information in Exhibit A must be withheld from the public pursuant to section 552.117(2) of the Government Code. Section 552.117(2) protects the home address, home telephone number, social security number, and family member information of "a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code." Unlike non-peace officer public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We have marked the information in Exhibit A that the city must withhold pursuant to section 552.117(2).

You also argue that portions of the documents you submitted under Exhibit B are protected by common-law and constitutional privacy. After reviewing those e-mail communications, we agree that small portions of some of those e-mails implicate an individual's privacy interests. We have marked the information in Exhibit B that the city must withhold on privacy grounds.

You next contend that the documents you submitted under Exhibit C are excepted from required public disclosure pursuant to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition

of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). After reviewing your arguments and the documents you submitted to this office, we conclude that you have demonstrated the applicability of section 552.107(1) to most of the information contained in Exhibit C. Accordingly, we have marked the information in Exhibit C that the city may withhold pursuant to section 552.107(1) of the Government Code.²

Finally, you contend that certain e-mail addresses contained in the documents you submitted under Exhibit E are excepted from required public disclosure pursuant to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

We agree that the documents you submitted under Exhibit E contain private e-mail addresses. We also conclude that the e-mail address we have marked in Exhibit B constitutes a private e-mail address. Accordingly, section 552.137 of the Government Code requires the city to withhold the e-mail addresses that we have marked unless the city receives an affirmative consent to release from the person to whom an e-mail address belongs. We note that section 552.137 does not apply to a public employee’s governmental e-mail address or a business’ general e-mail or web page address.

In summary, the city must withhold the information we have marked as coming under the protection of sections 552.101, 552.117(2), and 552.137 of the Government Code. The city must also withhold any social security number made confidential under federal law. The city may also withhold the information we have marked as coming under the protection of

²Because we resolve this aspect of your request under section 552.107(1), we need not address the applicability of the other exceptions you raised for this exhibit.

section 552.107(1) of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/seg

Ref: ID# 180468

Enc: Submitted documents

c: Mr. Neal Falgoust
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(w/o enclosures)